

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative
Penalty Order Issued to Erickson
Enterprises.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

A hearing was held in this matter on August 29, 2001 before Administrative Law Judge (ALJ) Richard C. Luis at the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota.

Peter L. Tester, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency ("MPCA" or "Agency"). Todd Erickson, 14613 Hanover Lane, Apple Valley, Minnesota 55124, appeared on behalf of Erickson Enterprises ("Appellant"). Mr. Erickson is the owner of the Appellant's business, which operates as a sole proprietorship. The record closed in this matter on August 29, 2001, at the close of the hearing.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Pollution Control Agency will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Karen Studders, Minnesota Pollution Control Agency, 520 Lafayette Road, Saint Paul, Minnesota 55155 to inquire about filing exceptions or presenting argument.

STATEMENT OF THE ISSUES

1. Whether the MPCA has demonstrated that Erickson Enterprises failed to meet its duty of candor, as required by Minn. R. 7000.0300; made an omission of material information from the waste manifest prohibited by Minn. Stat. § 115.075; and failed to provide notification of demolition activities, failed to keep disturbed asbestos

wet, and failed to meet the requirements for disposal of removed asbestos, as required by Minn. R. 7011.9920.

2. Whether the penalty amount and status of the penalty as non-forgivable is reasonable, based on all the circumstances in this matter.

FINDINGS OF FACT

1. The Shepherd of the Lake Lutheran Church (hereinafter “the Church”) sought to have various waste materials removed from an old farm house it owns, located across from 2451 McKenna Road in Prior Lake. After removal of those materials, the structure was to be burned by the local fire department as part of its training exercises. The Church intends to construct buildings on the land for a variety of purposes, including schooling, senior living, and worship.^[1] To identify what materials must be removed, the Church contracted with Environmental Demolition Inspections and Consulting (hereinafter “Environmental Demolition”) to inspect the premises. Environmental Demolition prepared a report on July 25, 2000 that indicated “400 square feet of linoleum friable paper backing located in the kitchen was found to contain asbestos.”^[2]

2. On August 9, 2000, Kermit Mahlum, Project Manager for the Church, contacted Jackie Deneen, Asbestos Program Coordinator for the MPCA, to inquire as to the requirements for asbestos disposal. Mr. Mahlum indicated that asbestos was present in a Church-owned building. Mr. Mahlum requested a list of licensed asbestos contractors from Ms. Deneen. Included on the list was Erickson Enterprises.

3. Mr. Mahlum hired Erickson Enterprises on August 10, 2000 to conduct the asbestos removal. Todd Erickson indicated that he and his employees would be going on a fishing trip over the weekend, but that the work could be done the next day (Friday, August 11, 2000).

4. On August 11, 2000, Mr. Erickson removed most of the regulated asbestos containing material (hereinafter “RACM”) from the kitchen of the building. He used a saw with a HEPA vacuum to cut through the linoleum and the plywood substrate below and removed the linoleum intact. The linoleum was wetted along the cut lines and wrapped in plastic sheeting.^[3] He carried the wrapped sheets of linoleum-covered plywood out to his trailer to transport the sheets to a landfill. By the time Mr. Erickson finished work on August 11, the landfill had closed and the sheets were left in Mr. Erickson’s trailer.

5. Mr. Mahlum observed the building on August 14, 2000 and saw that the flooring had been disturbed and most of the RACM was gone. He telephoned Mr. Erickson and discussed the removal. Mr. Erickson told Mr. Mahlum that the material had been removed “in a nonfriable manner.”^[4]

6. On August 14, 2000, Mr. Mahlum telephoned Ms. Deneen to express concern that the RACM had not been removed appropriately. At Ms. Deneen's request, Mr. Mahlum faxed a copy of the inspection report by Environmental Demolition.^[5] Ms. Deneen reviewed the report and noted that it identified friable asbestos that must be removed prior to burning the structures. The inspection report indicated that MPCA notification of the intent to perform demolition on the asbestos-containing material was required.^[6]

7. Mr. Mahlum completed a Notification of Asbestos Related Work form for filing with the MPCA. Mr. Mahlum faxed the completed form to Ms. Deneen on August 15, 2000.^[7] That form had not been completed or filed by Mr. Erickson or Erickson Enterprises.

8. On August 16, 2000, Katie Koelfgen (an MPCA staffer) telephoned Erickson and discussed the need to observe the RACM and current storage. Erickson agreed to a meeting on August 17, 2000. Later that night, Erickson telephoned Katie Koelfgen at the MPCA and left a message on her voicemail. The message indicated that he could not make the meeting on August 17, 2000 and that they would have to reschedule. Erickson made no mention of his intent to dispose of the RACM.

9. The morning of August 17th, Deneen and Koelfgen went to Erickson's residence to see if the trailer was still there. Neither the trailer nor the RACM were present. On August 18, 2000, they visited the Elk River Landfill to determine if the RACM could be found. A record of the disposal was maintained there, but the waste itself was not found.^[8] The signature of the responsible person at the landfill acknowledging receipt of the RACM was dated August 17, 2000.^[9] The receipt generated for payment of that load was dated August 17, 2000 and the time indicated was between 7:00 and 7:50 a.m.^[10]

10. Ms. Deneen visited the Church on August 18, 2000 to determine what demolition work had been done. She observed loose material in the kitchen and bathroom that she suspected contained asbestos.^[11] That material was dry. Deneen took samples of that material for testing.

11. Testing was performed by Braun Intertech on the samples collected by Ms. Deneen. Significant amounts of asbestos were found on the fibrous backing of each sample.^[12]

12. In her position as the Asbestos Program Coordinator with the MPCA, Jackie Deneen has experience with asbestos demolition and RACM removal. Ms. Deneen has completed coursework regarding the requirements for RACM removal and what constitutes appropriate removal and storage of RACM. Asbestos is regulated under state and federal law because of the possibility of adverse consequences when asbestos fibers become airborne.

13. Erickson Enterprises did not provide either written or oral notice to the MPCA at any time prior to the August 11, 2000 removal of the RACM from the building owned by the Church on McKenna Road.

14. The MPCA reviewed the matter at an internal forum, a meeting of enforcement officials who review alleged violations and recommend possible agency enforcement actions by the Commissioner. The forum recommended that a penalty be assessed against Erickson Enterprises. To calculate the amounts that should be assessed, the forum used a penalty matrix that characterized violations as ranging from minor to moderate to major in two categories, deviation from compliance and potential for harm. Base penalty ranges are set for each level of each category. The penalty is then determined to be forgivable or non-forgivable and adjusted by factors such as willfulness, history of other violations, and economic benefit derived from the violation.^[13]

15. In calculating the penalty, the forum treated the alleged violations as forming two groups. The group 1 violations relate to the failure to make the RACM available to the MPCA for inspection and failure to describe the location of the RACM removed prior to disposal. The group 1 violations have a major potential for harm due to the potential for dry asbestos fibers to become airborne. The deviation from compliance was also considered to be major since Erickson Enterprises took actions that prevented the MPCA from conducting an inspection.^[14] The base penalty for group 1 was set at \$8,500 due to the severity of the violation and the deviation from compliance. The forum noted that the removal methods caused asbestos-containing debris to contaminate the building and potentially expose persons to that hazard.^[15]

16. The group 2 violations are the improper removal of RACM violations. The presence of dry RACM throughout the work area was cited as the reason for finding the potential for harm to be major. The deviation from compliance was also considered to be major due to the actions of Erickson Enterprises in preventing the MPCA from inspecting the removal and disposal of the RACM.^[16] Using the penalty matrix, the base penalty for the group 2 violations was set at \$6,000 (near the low end of the range) due to the relatively small amount of RACM involved.

17. The forum concluded that the total base penalty amount of \$14,500 should be enhanced for the willfulness of Erickson Enterprises in violating the rules. The forum noted that Erickson Enterprises is a licensed asbestos abatement company and Mr. Erickson is a certified asbestos site supervisor, thus "the Company had full knowledge of the regulations."^[17] The enhancement factor was 25%, resulting in an additional penalty amount of \$3,625.^[18] The seriousness of the violations was relied upon to determine that the penalty should be non-forgivable.^[19]

18. In late September 2000, the Prior Lake Fire Department destroyed the Church-owned buildings by burning. The burning was conducted with a permit issued by the MPCA.^[20]

19. On April 27, 2001, the MPCA issued an Administrative Penalty Order to Erickson Enterprises imposing a non-forgivable penalty of \$10,000.^[21]

20. On May 18, 2001, Mr. Erickson requested an expedited hearing on the Administrative Penalty Order.^[22] The MPCA issued a Notice of and Order for Hearing setting this matter on for contested case hearing before Administrative Law Judge Richard C. Luis.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of the Pollution Control Agency and the Administrative Law Judge have jurisdiction over this matter under Minn. Stat. §§ 14.50 and 116.072.

2. The quantity of asbestos present at the demolition site exceeded the regulatory threshold of 160 square feet of regulated asbestos containing material, triggering the requirements of Minn. R. 7011.9920.

3. Erickson Enterprises was an “operator of a demolition or renovation activity...” when conducting work at this demolition site and was required to comply with the provisions of Minn. R. 7011.9920.

4. The ownership of the building, the intended means of disposal, and the ultimate use of the property removed the building from the residence exception for disposing of asbestos containing materials. Erickson Enterprises failed to take reasonable steps to determine that none of those conditions affected the building’s status respecting the residential exception before removing the RACM.

5. Erickson Enterprises failed to provide to the MPCA the notice required by Minn. R. 7011.9920 of the intention to conduct demolition activity in the building owned by Shepherd of the Lake Church, located across from 2451 McKenna Road in Prior Lake, Minnesota, in August 2000.

6. Erickson Enterprises failed to comply with Minn. R. 7011.9920 when it failed to ensure that regulated asbestos containing materials left on the premises were kept wet until collected and contained for disposal.

7. The delay between the removal of the RACM from the building and depositing that material in a landfill does not constitute a violation by Erickson Enterprises of the requirement under Minn. R. 7011.9920 to promptly dispose of RACM.

8. Erickson Enterprises failed to meet the duty of candor imposed by Minn. R. 7000.0300 when Mr. Erickson disposed of waste that he had agreed to retain for inspection by the MPCA.

9. Erickson Enterprises did not omit material information from the waste manifest in a manner prohibited by Minn. Stat. § 115.075.

10. The non-forgivable penalty of \$10,000 assessed by the Pollution Control Agency for these violations is appropriate and reasonable in this instance.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of the Pollution Control Agency uphold violations 1, 3 and 4 of the Administrative Penalty Order and the \$10,000 penalty recommended in this case against Erickson Enterprises.

Dated this 28th day of September, 2001.

/s/ Richard C. Luis

RICHARD C. LUIS

Administrative Law Judge

Reported: Taped (Three Tapes, No Transcript Prepared).

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

There is no factual dispute that Erickson Enterprises removed linoleum with paper backing that contained asbestos. Erickson Enterprises did not provide notice to the MPCA before beginning this demolition on behalf of the Church. The dispute in this matter is whether the asbestos removal contractor has the duty to ascertain the circumstances regarding the property when those circumstances trigger regulated asbestos containing material removal requirements.

The Church had an asbestos survey done indicating the presence of asbestos on the site. Mr. Erickson did not ask if such a survey had been done when he was hired to remove asbestos containing material from the building. Mr. Erickson was aware that

the use of the land after demolition of a residence could trigger disposal requirements for RACM. He did not ask about the ultimate use of the land after demolition. Mr. Erickson made no inquiry as to who owned the property that he had agreed to do asbestos removal work on.

Erickson Enterprises maintains that it had no notice of either the intended use of the land or the potential for the building's use in fire training. Mr. Erickson acknowledged that ownership of the building by a church would remove the building from the residence exception for RACM disposal. He also testified that he knew that demolition of the building by fire would remove the residence exception as well. As the person responsible for such removal, Mr. Erickson has the obligation to inquire into each of these areas. Failing to inquire is not reasonable and does not constitute a defense to failing to meet the RACM disposal requirements.

Erickson Enterprises asserts that the RACM cited by the MPCA as being in the bathroom demonstrates that the citation is improper, since Erickson Enterprises did not remove any material from the bathroom. The MPCA notes that Ms. Deneen photographed the RACM cited.^[23] The photograph shows vinyl floor covering and its backing lying on the bathroom floor. The material is not the floor covering in the bathroom itself. The photograph and testing of the material found in the bathroom shows that disturbed, dry RACM was located in several places in the building.

The MPCA contacted Mr. Erickson while the RACM remained in his possession and set a time to observe the RACM. Mr. Erickson then disposed of the RACM in a landfill without further notice to the MPCA. At the hearing, Mr. Erickson asserted that the MPCA had only asked to see the waste, rather than requiring that he retain it. Mr. Erickson had failed to notify the MPCA in advance of removing the RACM from the building. The MPCA, in essence, gave Mr. Erickson the opportunity to have the inspection conducted after the removal. He agreed to meet with the MPCA so that they could observe his handling of the RACM. Under such circumstances, disposing of the waste constitutes a violation of the duty of candor imposed by Minn. R. 7000.0300.

The MPCA has asserted that the failure of Erickson Enterprises to dispose of the RACM promptly is a violation of Minn. R. 7011.9920. The landfill closed before Mr. Erickson could dispose of the RACM on August 11, 2001. The landfill did not open again until August 14, 2001. The MPCA then contacted Mr. Erickson and asked him to retain the waste for inspection. The facts of the matter show no violation of the rule. Similarly, the absence of any notation on the waste manifest of the intervening location of the waste has not been shown to be material. There was no effort to conceal the location of the waste. The omission of a notation showing interim location(s) from the waste manifest does not constitute a violation of Minn. Stat. § 115.075 in this instance.

The Appellant's violations in the handling of RACM and failure to notify the MPCA created a potential for severe harm. The degree of deviation from compliance is accurately characterized as major. While not all the violations alleged were proven in this matter, the violations that were proven support adequately the penalty

recommended by agency staff. The upward adjustment of the penalty by \$3,625 as proposed by the MPCA is justified. The information needed by Mr. Erickson in order to determine whether the residential exception applied, that is, ownership, intended disposal method, and ultimate use of the property was available and he neglected to ask for it.^[24] Further, the contents of the asbestos survey would have provide other needed information, but Mr. Erickson neglected to ask for that document before performing the work. His cavalier approach to the MPCA's request for viewing the waste supports the conclusion that Mr. Erickson was willfully avoiding his obligation to make the RACM available for inspection by the MPCA. The Administrative Law Judge recommends that the Administrative Penalty Order issued to Erickson Enterprises on April 25, 2001 be adopted as the final agency order, after the two modifications discussed above.

R.C.L.

^[1] Mahlum Testimony.

^[2] MPCA Exhibit 2, at 3.

^[3] MPCA Exhibit 17.

^[4] Mahlum Testimony.

^[5] MPCA Exhibit 1.

^[6] MPCA Exhibit 2, at 5.

^[7] MPCA Exhibit 3.

^[8] MPCA Exhibit 14.

^[9] *Id.*

^[10] *Id.*

^[11] MPCA Exhibits 5-9.

^[12] MPCA Exhibit 12

^[13] MPCA Exhibit 20, at 4.

^[14] MPCA Exhibit 20.

^[15] MPCA Exhibit 20.

^[16] MPCA Exhibit 20.

^[17] MPCA Exhibit 20, at 3.

^[18] MPCA Exhibit 20, at 4.

^[19] *Id.*

^[20] Mahlum Testimony.

^[21] MPCA Exhibit 19. The MPCA is limited to a maximum penalty of \$10,000 per order by Minn. Stat. § 116.072, subd. 2.

^[22] MPCA Exhibit 24, Attachment B.

^[23] MPCA Exhibit 9.

^[24] The \$10,000 limit imposed by Minn. Stat. § 116.072, subd. 2, is not affected by the upward adjustment in the penalty order. The propriety of the upward adjustment supports retention of the penalty amount at the maximum statutory level.